IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

GREGG AND MICHELLE BURRIS,)
Plaintiffs,) NO. 3:01-cv-30091
Vs.) FINDINGS OF FACT,) CONCLUSIONS OF LAW
FIVE RIVER CARPENTER DISTRICT) AND ORDER FOR JUDGMENT
COUNCIL HEALTH AND WELFARE)
FUND,)
)
Defendant.	

This is an action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., concerning plaintiffs' rights to continuation of health insurance coverage provided for in the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") amendments to ERISA. Plaintiffs' claim is solely for statutory penalties.

In a June 30, 2003 ruling on defendant's motion for summary judgment (hereinafter "June 30 Ruling"), the Court rejected the defendant's legal arguments and held that plaintiffs were entitled to elect continued health insurance coverage and notice of their right to do so. The Court also declined to grant summary judgment on plaintiffs' additional claim for a statutory penalty based on defendant's failure to timely respond to a request for information, an issue not addressed in defendant's motion papers. The matter came on for trial on September 8, 2003. Post-trial arguments have been filed and the matter is fully submitted.

FINDINGS OF FACT

The factual background was fully set out in the June 30 Ruling. In addition, the final pretrial order filed August 29, 2003 included a full stipulation of the parties as to the facts, which the Court now incorporates as its findings. The stipulation is attached to this ruling. The June 30 Ruling and attachment should be read in conjunction with what follows. As the plenary stipulation implies, except in a few particulars the facts are not disputed.

The Five River Carpenter District Council Health and Welfare Plan (the "Plan") is a multi-employer employee health and welfare plan governed by ERISA. The Plan provides health and medical benefits to union employees of certain contractors who have signed a collective bargaining agreement with a carpenters union. The Plan is administered by the Joint Board of Trustees of the Five River District Council Health and Welfare Fund (the "Fund"). At all relevant times Rick Hanna was a union trustee and chairman of the board of trustees of the Fund. (See Ex. 1 at 15). Joe Day was the attorney for the Fund. Eastern Iowa Fringe Benefits Funds, Inc. (EIFBI) was the third-party administrator for the Plan, but had discretion to interpret and administer the Plan only with respect to claims processing.

The Plan provided that eligibility was determined on the basis of accumulated hours of work for a bargaining unit employer,

the employee's "hour bank." Under the Plan, a qualifying event for COBRA continuation of coverage occurred if the employee's hour bank hours were "reduced to zero." This happened if the employee went to work for a non-union employer in the construction industry, or went to work for a non-industry employer and failed to work for a contributing employer when requested to do so. (Ex. 1 at 13-18).

The Ninth Circuit opinion in <u>Devoll v. Burdick Painting</u>, <u>Inc.</u>, 35 F.3d 408 (9th Cir. 1994), came to Mr. Day's attention. In June 2000 he advised the Fund he believed the holding in <u>Devoll</u> signified that a situation in which a participant left covered bargaining unit work to become employed by a non-contributing employer in the industry was not a COBRA qualifying event, <u>i.e.</u>, not a termination of employment. Effective October 1, 2000, the trustees amended the Plan provision concerning zeroing of hour bank hours as a qualifying event. As amended, such a reduction became a qualifying event if the reduction was "for reasons other than your employment with a non-contributing employer in the construction industry" (June 30 Ruling at 5).

Gregg Burris was a Plan participant and his wife Michelle Burris a beneficiary. On September 11, 2000 Burris sent written notice to Hanna that he was no longer a union carpenter. (Ex. 2). On September 12, 2000, Hanna in turn sent a memo to EIFBI identifying individuals, including Burris, "who should receive a notice of bank hours to be zeroed or individuals who need notices

sent to them questioning their whereabouts" because they were "believed to be working outside of a collective bargaining agreement." On September 14, 2000 EIFBI wrote to Burris notifying him "[y]ou are no longer considered a 'covered employee' when you fail to go to work for a union employer when requested to do so" and that his bank hours would be reduced to zero if he did not document within 10 days that he was currently a member of the union and should be eligible for coverage under the Plan. (Ex. 3).

On September 19, 2000 Burris wrote back to EIFBI at the address in the summary plan description, 205 - 50th Avenue SW, Cedar Rapids, Iowa, 52404, notifying the Plan he would like COBRA continuation coverage. EIFBI had moved to 1831 - 16th Avenue SW, Cedar Rapids, Iowa, 52404, and did not receive the letter. It had experienced problems with forwarded mail. EIFBI had previously notified Plan participants of its change of address. The Court thus credits the testimony of both Burris and EIFBI office manager Shelly VanDraska on the subject.

On September 27, 2000 the Fund sent Burris notice his bank hours had been reduced to zero. Burris was no longer eligible for benefits effective September 30, 2000.

It apparently was the practice of the Fund to review participant eligibility quarterly. EIFBI's practice was to send COBRA notices to those entitled to them about ten days after the end of a calendar quarter. EIFBI did not issue a COBRA continuation notice to Burris on the advice of Mr. Day.

Michelle Burris had a serious pre-existing health condition, a genetic blood clotting disorder which required periodic treatment. The Burrises were concerned about maintaining health insurance coverage and were alert for receipt of the COBRA notice. When it did not promptly arrive, Gregg Burris telephoned EIFBI's office on October 3 and 4, 2000 and inquired. In the first call an unidentified woman told him he was not eligible, apparently referring to the October 1, 2000 Plan amendment. Like other participants Mr. Burris had received notice of the change. He argued he was not affected by the amendment because he had terminated his employment before the effective date. Burris did some research and called again the next day. In the second call he talked to another woman who also said he was not eligible because of the amendment to the Plan. Again Burris pleaded his case. He was told to call Hanna and did so. Burris told Hanna the new amendments did not affect him and that he wanted COBRA coverage. Hanna consulted with Day, then called back and told Burris it was Day's opinion he was not entitled to COBRA notice because he was ineligible for COBRA continuation of coverage.

The same day he talked to Hanna, Burris called the Department of Labor (DOL) to enlist its assistance. Burris estimated that over the next several months he had at least twenty conversations with DOL representatives from which he gained the impression that he and his wife were eligible for continuation of

coverage. A DOL representative contacted EIFBI on October 5, 2000. Mr. Day became involved and asked DOL what information it needed concerning Burris. He followed up the next day, October 6, with correspondence giving the opinion that Burris did not satisfy the statutory definition of a qualifying event.

On December 18, 2000 Gregg Burris wrote to the Fund trustees contending that he was entitled to COBRA benefits under the plan description in effect at the time he ceased to be a participant. He requested "a written response specifically outlining why COBRA has not been offered to me." (Ex. 6). Though the letter was sent to EIFBI's old address, it was received and brought to the attention of the Fund trustees. On January 10, 2001 Burris called Day directly and asked why he was not covered. Burris testified that Day responded Burris was not covered under the October 1, 2000 amendment to the Plan. Mr. Burris renewed his request for a written response, and Day said he probably would not get one.

Day did, however, on January 11, 2001 ask DOL for a written opinion concerning Day's reading of the <u>Devoll</u> case. The next day a DOL representative faxed a response to Day, with a copy to Burris, stating that "since the beginning of October 2000, I have repeatedly informed you of the Department of Labor's position on COBRA compliance in the situation regarding Gregg Burris and the Five River Carpenter District has not complied." (Stip. ¶ BB).

On January 16, 2001 the Fund trustees met and determined "Burris was no longer eligible for Plan participation prior to September 2000." Mr. Day was directed to send letters accordingly to DOL and Burris. On January 23, 2001 Burris again sent a letter to the Trustees requesting a written explanation why he had been denied COBRA coverage.

The Fund had a change of heart. On January 30, 2001 Mr. Day wrote to Mr. Burris explaining that the trustees had decided to treat his written request as an appeal and, to avoid hardship, had also decided to grant the COBRA benefits to him. The Court believes a fair inference from the record is that the trustees also realized the various reasons given to Burris and DOL for denying COBRA coverage were untenable. The January 30 letter enclosed the formal COBRA notice and required information. On February 3, 2001 Mr. Burris signed and returned the COBRA election form on behalf of himself and his wife. The Burrises were required to pay premiums retroactive to October 1, 2000, did so and were afforded coverage. All covered medical expenses incurred by Mr. and Mrs. Burris in the interim were paid. Michelle Burris had not had any blood clotting episodes which required medical treatment. However, both she and her husband felt considerable anxiety about the uncertainty of coverage and what would happen if Mrs. Burris needed treatment for her condition.

DISCUSSION INCLUDING ADDITIONAL FACTUAL FINDINGS

As discussed in the June 30 Ruling, COBRA mandates that a qualified beneficiary under a group health plan be afforded an opportunity to continue coverage when certain qualifying events which would terminate coverage occur. 29 U.S.C. §§ 1161(a). One such qualifying event is "termination . . . of the covered employee's employment." Id. § 1163(2).

Gregg Burris terminated his employment when he wrote to Hanna that he was no longer a union carpenter. Hanna and Burris both understood this to mean that Burris had ceased employment with contributing employers under the Plan. (See Stip. ¶ K). For the reasons stated in the June 30 Ruling at 12-13, Devoll cannot be read as broadly holding "that an employee's quitting union employment for non-union employment in the same industry disqualifies the employee from COBRA coverage otherwise available to those who terminate their employment." Id. at 13. But regardless of the import of Devoll, the zeroing of Burris' hour bank hours on September 27, 2000 was an express qualifying event under the terms of the Plan then in effect. The October Plan amendment did not

¹ In the case of a termination of employment "qualified beneficiary" includes both the covered employee and the employee's spouse. 29 U.S.C. §§ 1163(2), 1167(3)(A), (B).

apply to Burris.² The Burrises therefore were entitled to COBRA continuation of coverage and notification of their right to so elect. 29 U.S.C. § 1166(a)(4)(A).

The Burrises seek statutory penalties as allowed by 29 U.S.C. § 1132(c)(1)(A) and (B): (1) for failing to send the COBRA notice within the statutory time period and (2) for failing to provide information in response to Mr. Burris' queries about COBRA coverage commencing with Mr. Burris' first phone call on October 3, 2000.

1. The Notice Violation

The Fund failed to timely notify the Burrises of their right to continuation coverage. The COBRA provisions generally require the administrator to give notice within fourteen days of being notified of a qualifying event. 29 U.S.C. § 1166(a)(4), (c). The Fund is subject to a statutory penalty of up to \$110 per day from the date of the failure. 29 U.S.C. § 1132(c)(1)(A); 29 C.F.R. § 2575.502c-1. The purpose of the penalty is to punish noncompliance. Chestnut v. Montgomery, 307 F.3d 698, 704 (8th Cir. 2002). Two issues remain: (1) over what period of time should the fund be subject to payment of a penalty, and (2) what penalty, if any, should be imposed.

 $^{^2}$ The Court does not understand the Fund to argue in this case that the amendment was applicable to Burris. <u>See</u> June 30 Ruling at 12 n.3.

Plaintiffs arque the COBRA notice clock started running on September 11, 2000, the date Burris wrote Hanna he was quitting The letter to Hanna was notice to the Fund as administrator of a qualifying event. Accordingly, say plaintiffs, the fourteen-day period gave the Fund to September 25 to notify them after which it was in violation. Assuming plaintiffs are right about the start date of the violation the Court elects as a matter of discretion not to impose a statutory penalty from September 25. Had the Devoll issue not arisen, the routine practice of the Fund and EIFBI would have been to provide COBRA notice within about ten days after the end of the quarter, the point at which the Burris' eligibility under the Plan terminated. The Burrises could have had no complaint had they received notice within this time frame. In effect, the Fund did not treat Mr. Burris as having terminated his employment until his hour bank hours were reduced to zero and his eligibility ended. In the context of the multi-employer plan here this treatment does not warrant a penalty.

Plaintiffs argue the end of the notice penalty period should be February 22, 2001, the date on which the Plan informed them they would have to pay five months retroactive premiums, not January 30, 2001, the date on which Mr. Day wrote to Mr. Burris tendering COBRA coverage. Plaintiffs point out the January 30 communication did not notify them of the retroactive premium requirement.

The statute does not specify the content of a COBRA notice. Chesnut, 307 F.3d at 702. In general the notice "must be sufficient to allow the qualified beneficiary to make an informed decision whether to elect coverage." Id. (quoting McDowell v. Krawchison, 125 F.3d 954, 958 (6th Cir. 1997)). Most recently the Eighth Circuit has said the notice "must adequately inform the beneficiary of the COBRA coverage he is entitled to receive . . . and the money owed to maintain this coverage." Geissal v. Moore Medical Corp., 338 F.3d 926, 934 (8th Cir. 2003)(citing Lincoln Gen. Hosp. v. Blue Cross/Blue Shield, 963 F.2d 1136, 1140 (8th Cir. 1992); see Chesnut, 307 F.3d at 702. The January 30 COBRA notice did not notify the Burrises of the retroactive cost of coverage and to this extent may not have been sufficient. The Court will exercise its discretion not to penalize this failure. The Burrises did not need information about the amount of retroactive premium to make an informed decision. Because of Mrs. Burris' blood clotting condition they needed the coverage and exercised their election right immediately after receipt of the January 30 letter.

The Court therefore finds that the period of the notice violation appropriately subject to a statutory penalty is from October 15, 2000 to January 29, 2001 inclusive, a total of 107 days.

As a qualified beneficiary Mrs. Burris was entitled to separate notice of her right to elect continuation coverage. <u>See</u>

307 F.3d at 703; 29 U.S.C. §§ Chesnut, 1166(a)(4)(A), 1167(3)(A)(i). Consequently, there were two notice violations. The Court believes, however, that the violations merge for punishment purposes in the circumstances here. The Burrises resided together. The concern about Mrs. Burris' condition is what made availability of the COBRA coverage option of particular importance to them. In his dealings with the Fund Gregg Burris acted for himself and for his wife. The Fund did not deny COBRA coverage for any reason specific to Mrs. Burris. It is difficult to distinguish between the plaintiffs for the purposes of punishment. statutory penalty is not compensatory, its purpose is punitive. In view of the circumstances just described, the Court believes imposition of punishment for a single violation is adequate and appropriate to accomplish this purpose.³

³ As plaintiffs note there is language in the enforcement provisions of the statute which suggests a failure to provide COBRA notice to a participant and beneficiary should be treated as a single violation for penalty purposes. Paragraph (c)(1) of 29 U.S.C. § 1132 sets out the penalty for both violation of the notice requirement and failure to comply with a request for information. The last sentence of the paragraph states that "each violation [of the notice requirement] with respect to any single participant, and each violation [of the information requirement] with respect to any single participant or beneficiary, shall be treated as a separate violation." (Emphasis added). The omission of the "or beneficiary" alternative with respect to notice violations implies that a failure to provide notice to a beneficiary should not be treated as a separate violation for punishment purposes. As the circumstances of this case do not warrant punishment of the failure to provide notice to Mrs. Burris as a separate violation, it is not necessary to resolve this issue.

The Fund argues that the Court should exercise its discretion in favor of not imposing any statutory penalty for the notice violation because it acted in good faith in reliance on advice of counsel and the Burrises suffered no harm. As noted previously, "[t]he purpose of ERISA's statutory penalty is to punish noncompliance." Chesnut, 307 F.3d at 704. Good faith or the absence of harm do not preclude an award of a statutory penalty, but are relevant factors in deciding whether to penalize. Id.; see Brown v. Aventis Pharmaceuticals, Inc., 341 F.3d 822, 825 (8th Cir. 2003); Brown v. American Life Holdings, Inc., 64 F. Supp. 2d 882, 891 (S.D. Iowa 1998), aff'd 190 F.3d 856 (8th Cir. 1999).

In the first <u>Brown</u> case just listed, the plaintiff had to terminate employment as a result of a disability. Because of her health problems, it was important that she obtain continued coverage, including conversion of her life insurance policy. The company plan required forms be completed and fees paid within thirty-one days of termination. Although the employer's letter specifying the effective date of Brown's termination indicated she would receive further information about her benefits, Brown did not receive the COBRA notice promised, made repeated phone calls to Aventis and had to hire an attorney to try to obtain the information. She finally received the information and forms approximately four months later, but was unable to convert her prior life insurance coverage.

The company's "good faith" argument was based on "administrative error - ostensibly caused by the company moving its offices during [the] time period." Brown, 341 F.3d at 825. The Eighth Circuit responded that while there was no evidence the failure was the result of anything other than administrative error, "Aventis' failure to act for a period of several months, despite Brown's repeated phone calls, could be considered bad faith." Id. As to the claim of "no harm," the court observed "although Brown did not suffer any loss of health benefits due to the delay, she was forced to invest time, effort, and money in hiring an attorney to gain access to information that she was legally entitled to." Id. The Eighth Circuit upheld the trial court's award of the maximum penalty. Id.

The <u>Brown</u> case has some similarities with this one. Gregg Burris made a number of phone calls to the Fund seeking continuation of coverage and an explanation why he and his wife were not entitled to it. He enlisted the assistance of the Department of Labor. He wrote letters. Only as a result of his persistence did the Fund relent and accord plaintiffs the opportunity to elect coverage to which they were clearly entitled. They should not have been put to this burden.

Other facts also support the imposition of a penalty. When the Fund finally sent the COBRA notice to Mr. Burris on January 30, 2001, it described its decision as based on hardship

though just two weeks before its trustees had made "[a] determination . . . that Mr. Burris was no longer eligible for Plan participation prior to September 2000." (Ex. 7 at 21). To the extent he had been given any explanation, Mr. Burris was told he was not eligible because the October 1, 2000 Plan amendment disqualified him, an improper retroactive application of a plan amendment to deny benefits. See Winterrowd v. American General Annuity Ins. Co., 321 F.3d 933, 938 (9th Cir. 2003)(citing Confer v. Custom Eng'q Co., 952 F.2d 41, 43 (3d Cir. 1991)). Though the Fund ultimately did the right thing, its dealings with the Burrises throughout can fairly be characterized as dissembling.

Mr. Day did advise the Fund the Burrises were not entitled to COBRA coverage. That fact is a matter in mitigation, and is the principal reason the Court will substantially discount the penalty amount, but Mr. Day's advice does not warrant complete avoidance of a penalty. The <u>Devoll</u> case was factually entirely different and its rationale inapposite for the proposition that quitting union employment and going to work for a non-union employer in the industry is not a termination of employment. But again, regardless of <u>Devoll</u>, a qualifying event occurred under the plain language of the Plan when the Fund reduced Mr. Burris' hour bank hours to zero.

Finally, while it is true the DOL did not give the Fund a formal opinion, its communications with Mr. Day indicated it viewed the Fund's position as noncompliant with COBRA.

The Court does not believe the Fund's conduct in this matter rises to the level of subjective bad faith. The absence of bad faith here is, in light of the circumstances described, faint praise which does not outweigh the factors discussed above concerning the Fund's conduct which do warrant a penalty.

The absence of economic harm is also not determinative. The Burrises were fortunate in that Mrs. Burris' condition did not flare up, but they suffered a degree of emotional harm over the uncertainty about their health insurance coverage made more acute by the possibility Mrs. Burris might at any moment need medical treatment. Emotional harm from an ERISA violation is appropriately considered in assessing the relevant factor of prejudice or harm to the plaintiff. See Porcellini v. Strassheim Printing Co., Inc., 578 F. Supp. 605, 615 & n.2 (E.D. Pa. 1983); see also Kerr v. Chas. F. Vatterott & Co., 184 F.3d 938, 948 (8th Cir. 1999)(court may look at prejudice to plaintiff in assessing statutory penalty).

This is a case in which there was culpable but not malicious conduct, some harm and much inconvenience without extreme prejudice. Upon careful consideration of all of the relevant factors, the Court finds that a statutory penalty in the amount of \$55 per day for a period of 107 days should be assessed against

defendant for the notice violation. <u>Cf. Brown</u>, 64 F. Supp. 2d at 891.

2. Information Violation

Plaintiffs contend the failure of the Fund to respond to Gregg Burris' oral requests for information commencing in early October 2000 as to why he and his wife were not eligible to elect COBRA coverage was a failure to provide requested information which subjects the fund to a statutory penalty under 29 U.S.C. § 1132(c)(1)(B). That provision penalizes an administrator who "fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary." The threshold question is whether the statute required the Fund to provide an explanation why the Burrises were not eligible for COBRA coverage.

The COBRA provisions are codified in 29 U.S.C. §§ 1161-69. Beyond plan documents, which an administrator must furnish a participant or beneficiary upon written request, 29 U.S.C. § 1024(b)(4), the only information an administrator is obligated to provide with respect to eligibility for COBRA continuation coverage is notice of the "beneficiary's rights under" the COBRA provisions upon the occurrence of a qualifying event. 29 U.S.C. § 1166(a)(4). It was the Fund's position that a qualifying event entitling the Burrises to the statutory notice did not occur. The statute does not expressly require an administrator to explain in response to a

request from a participant or beneficiary why the administrator does not believe the individual is entitled to notice.

Even if the Fund was required to give Mr. Burris the explanation he sought, the circumstances would not warrant imposition of a penalty. In the course of his conversations with the two EIFBI employees on October 3 and 4, and with Mr. Hanna during the same time frame, Burris was given an explanation why he was not eligible for COBRA coverage. The Fund's reason at the time, communicated to Burris, was that he was not eligible because of the October 1 amendment to the Plan. Mr. Burris had good reason to take issue with the explanation, but he was given a reason.

Later, on December 18, 2000, Mr. Burris sent a written request for "a written response specifically outlining why COBRA has not been offered to me." The Fund did not respond to the request within the 30-day time period laid out in § 1132(c)(1)(B) but the request was not ignored. The matter was brought to the Fund Trustees who, within the 30-day period, instructed Mr. Day to respond to Mr. Burris with the reason that he was "no longer eligible for Plan participation prior to September, 2000." (Ex. 1 at 21). Subsequently the trustees evidently changed their mind and decided to grant the COBRA benefit and give the required notice. On January 30, 2001 Mr. Day wrote to Mr. Burris accordingly. The January letter was twelve days late, but the period of delay was one in which the Fund changed its position to the Burris'

advantage. The Burrises were not prejudiced by the delay and may have benefitted from it. In the exercise of its discretion the Court has determined not to impose a statutory penalty for any information violation which may have occurred.

3. Attorney Fees

Plaintiffs ask for an award of attorney fees. The statute permits the Court to "allow a reasonable attorney's fee and costs of the action to either party." 29 U.S.C. § 1132(g)(1). There is no presumption that having prevailed the plaintiffs are entitled to fees. Martin v. Arkansas Blue Cross & Blue Shield, 299 F.3d 966, 971-72 (8th Cir. 2002). The case law sets out a number of non-exclusive factors which guide the Court's discretion on the subject. These are:

(1) the degree of culpability or bad faith of the opposing party; (2) the ability of the opposing party to pay attorney fees; (3) whether an award of attorney fees against the opposing party might have a future deterrent effect under similar circumstances; (4) whether the parties requesting attorney fees sought to benefit all participants and beneficiaries or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.

<u>Id.</u> (citing <u>Lawrence v. Westerhaus</u>, 749 F.2d 494, 496 (8th Cir. 1984)).

The Fund did not address the fee question in its posttrial argument and plaintiffs did so only briefly. In these circumstances the Court will defer a final determination whether to award fees. Plaintiff may file a post-trial motion for attorney fees and costs within the time provided in Fed. R. Civ. P. 54(d)(2) and providing the information required by LR 54.2(a). Defendant may respond to the motion within the time provided in LR 7.1(e).

CONCLUSIONS OF LAW

- 1. Defendant Five River Carpenter District Council Health and Welfare Fund violated 29 U.S.C. § 1166(a)(4), (c), by failing to give timely notice of plaintiffs' right to elect to continue health insurance coverage under the COBRA provisions. The Fund should pay a statutory penalty as authorized by 29 U.S.C. § 1132(c)(1)(A) for a period of 107 days from October 15, 2000 to January 29, 2001 inclusive at the rate of \$55 per day totaling \$5,885.
- 2. Plaintiffs have not established that the Fund failed or refused to comply with any request from plaintiffs for information which the Fund was required to furnish and to the extent any violation may have occurred in this regard, it is a proper exercise of discretion not to award an additional penalty for a violation of 29 U.S.C. § 1132(c)(1)(B).
- 3. The Court will consider the propriety of an award of attorney fees and expenses on post-judgment motion which plaintiffs may file within the time provided in Fed. R. Civ. P. 54(d)(2)(B) with the information required by that rule and LR 54.2(a).

ORDER FOR JUDGMENT

The Clerk shall enter judgment substantially as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment in the amount of Five Thousand Eight Hundred Eighty-five Dollars (\$5,885.00) is entered in favor of plaintiffs Gregg Burris and Michelle Burris and against defendant Five River Carpenter District Council Health and Welfare Fund, plus interest as provided by law.

IT IS SO ORDERED.

Dated this 15th day of January, 2004.

ROSS A. WALTERS

CHIEF UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

Gregg and Michelle Burris, Plaintiffs,))	No. 3:01CV30091	2603
vs.	j		75
Five River Carpenter District Council Health and Welfare Fund, Defendant.)))	RROSCSED ORDER ON FINAL PRETRIAL CONFERENCE	29 P. 3: 5

A Final Pretrial Conference was held in the above-captioned matter pursuant to Fed.R.Civ.P. 16 on August 27, 2003.

The following counsel, who will try the case, appeared at the conference:

- For plaintiffs:
 Linda M.Levey
 S. Clinton Street, Suite 250
 Iowa City, IA 52240-4014
 (319)341-2226 Phone & Fax
- 2. For defendant:
 Kay Johansen
 Day Rettig Peiffer P.C.
 P.O. Box 2877-2877
 Cedar Rapids, IA 52406
 (319) 365-0437
 Fax: 319-365-5866

Accordingly, IT IS ORDERED:

- I. THE PARTIES AGREE THAT THE FOLLOWING FACTS ARE TRUE AND UNDISPUTED:
 - A. The Five River Carpenter District Council Health and Welfare Plan ("PLAN") sponsors a multi-employer health and welfare benefit plan governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq.
 - B. The Plan is administered by Defendant Joint Board of Trustees of the Five River District Council Health and Welfare Fund ("FUND")
 - C. Eastern Iowa Fringe Benefit Funds, Inc. ("EIFBI") has been designated as the third party

- administrator for the Plan and has been given the "discretion to interpet and administer the Plan for claims processing only."
- D. Gregg Burris was a Plan participant.
- E. Michelle Burris was a Plan beneficiary and is Gregg's spouse.
- F. Pursuant to the amended minutes of the Trustees' meeting on June 1, 2000, Joe Day, Fund counsel, advised the Trustees that a situation where a participant left covered bargaining unit work to become employed by a non-contributing employer in the industry did not constitute a COBRA qualifying event. Attorney Day based his advice to the Trustees on his analysis of Devoll et al. v. Burdick Painting, Inc. Plaintiff objects to relevance:
- G. On June 23, 2000, Day advised the Trustees in a memo that a COBRA qualifying event did not include a situation where a participant left covered bargaining unit work to become employed by a non-contributing employer in the carpenter industry.

 Plaintiff objects to relevance. In his memo Day stated that the acquisition of employment is not one of the seven qualifying events for COBRA.
- H. On August 29, 2000, the Trusted amended the Plan, effective October 1, 2000, in reference to COBRA qualifying events. This amendment was drafted by Day and conformed to the advice he gave the Trustees regarding COBRA qualifying events.
- T. Plan participants were notified of the amendment on September 29, 2000. Duplicate of N
- J. On September 11, 2000, Burris notified in writing Rick Hanna, a Trustee, that he was no longer a union carpenter.
- K. On September 12, 2000 Hanna sent a memo to EIFBI. In the memo Hanna identified individuals, including Burris, "who should receive a notice of bank hours to be zeroed or individuals who need notices sent to them questioning their whereabouts" in addition to stating that they were "believed to be working outside of a collective bargaining agreement."
- L. On September 14, 2000, the Fund wrote to Burris: "[y]ou are no longer considered a 'covered employee' when you fail to go to work for a union

- M. On September 27, 2000, the Fund sent Burris notice that his bank hours were reduced to zero.
- N. On September 28, 2000, the Fund sent all participants a notice of Plan amendments, effective October 1, 2000.
- O. Prior to amendment, the Summary Plan Document stated that "a [COBRA] qualifying event occurs if 1) your Hour Bank hours are reduced to zero, 2) your elective self-payment rights have been exhausted, or 3) you are not employed by an employer under the applicable collective bargaining agreement even though you are available for such employment."
- P. Effective September 30, 2000, Burris was no longer eligible for Plan benefits.
- Q. On October 3 and 4, 2000, Gregg Burris called the Fund office.
- R. On October 4, 2000, Burris spoke with Hanna who told him of Day's opinion that he would not be receiving a COBRA notice because he was ineligible.
- S. Burris contacted the U.S. Department of Labor ("DOL") to complain on October 4, 2000.
- T. On October 5, 2000 DOL contacted the Fund, through EIFBI, regarding Gregg Burris.
- U. On October 5, 2000 Attorney Day asked DOL to provide clarification of the information they needed regarded Gregg Burris.
- V. On October 6, 2000, Attorney Day wrote DOL and stated that Gregg Burris did not satisfy the definition of a qualifying event to entitle him to COBRA continuation coverage.
- W. The Trustees met on November 28, 2000. Attorney Day reported to the Trustees that Burris had complained to DOL.
- X. On December 7, 2000, Burris called Hanna.
- Y. On December 18, 2000 Burris sent a letter to the Trustees of the Fund requesting a written response outlining why he was not offered COBRA coverage.

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- On January 10, 2001, Burris called Attorney Day.
- AA. On January 11, 2001, Attorney Day asked DOL for a written opinion concerning the legal interpretation of the Ninth Circuit case (DeVoll v. Burdick Painting) that he relied on.
- On January 12, 2001, DOL faxed its response to BB. Day, with a copy to Burris, stating that "since the beginning of October 2000, I have repeatedly informed you of the Department of Labor's position on COBRA compliance in the situation regarding Gregg Burris and the five River Carpenter District has not complied," and advised Day of the procedure to obtain an advisory opinion.
- On January 16, 2001, the Trustees met. The CC. Trustees determined that "Burris was no longer eligible for Plan participation prior to September 2000." Attorney Day was directed to send letters to DOL and Burris.
- On January 23, 2001, Burris sent a letter to the DD. Trustees again requesting in writing information as to why he was being denied COBRA coverage.
- EE. On January 30, 2001, Attorney Day wrote to Burris offering COBRA coverage with the explanation that the Trustees determined that the Notice of Change in Plan Benefits caused Burris hardship and therefore granted his request, as an exception.
- On February 3, 2001, Burris signed and returned FF. the COBRA election notice to the Fund on behalf of himself and Michelle.
- The Fund's offer of COBRA coverage was contingent GG. on Burris' paying the premiums retroactive to October 1, 2000.
- HH. Burris paid the COBRA premiums of \$1530.95, retroactive to October 2000.

EXHIBITS: II.

A. The parties agree that the following exhibits shall be considered to be already in evidence at the trial without further offer, proof, or objection. Specifically, the parties agree that both plaintiffs' and defendant's exhibits listed under this portion (paragraph II, A) of the Proposed Order on Final Pretrial Conference are in evidence at the commencement of the trial and